Supreme Court, U.S.
FILED

98 147 JUN 25 1998

OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

TPI INTERNATIONAL AIRWAYS, INC.,

Petitioner,

vs.

SECRETARY OF THE AIR FORCE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Federal Circuit

# PETITION FOR WRIT OF CERTIORARI

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28 pp

## THE QUESTION PRESENTED FOR REVIEW

Is the U.S. Air Force required to follow its own security regulation(s) to protect from, and investigate cases of, sabotage and suspected sabotage of civil airline aircraft given the following facts:

a. The aircraft were on Tinker Air Force Base, Oklahoma, when the events occurred.

b. The aircraft were under exclusive contract to the Air Force for military transportation purposes.

c. 32 C.F.R. 855.6(b)(1) specifically states that the Government has liability responsibility for all damages or injury associated with the operations of civil contract aircraft on military airfields.

d. 32 C.F.R. 809a.1(a) makes Air Force installation commanders responsible for protecting personnel and property under their jurisdiction.

## PARTY AND CORPORATE INFORMATION

The parties are all identified in the caption of the case.

There is no parent or subsidiary company to TPI International Airways, Inc.

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## CITATION TO OPINION BELOW

The decision of the U.S. Court of Appeals for the Federal Circuit is unreported, however, a copy of the order denying the petition for rehearing and suggestion for rehearing en banc is attached as Appendix A-1, A-2.

The opinion of Judge Allan F. Elmore of the Armed Services Board of Contract Appeals is attached as Appendix A-3 to 7.

## BASIS FOR SUPREME COURT JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). The judgement of the U. S. Court of Appeals was dated January 13, 1998. The order of the Court of Appeals that denied the petition for rehearing is dated April 3, 1998. This petition is timely filed within 90 days thereafter.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Constitution Article II, Section 2 which reads "The President shall be the Commander in Chief (of the military)".

10 U.S.C. 8061 provides "The President may prescribe regulations for the government of the Air Force".

10 U.S.C. 8062(d)(3) states that "The Air Force consists of all Air Force Units and ... supporting and ... logistic elements".

32 C.F.R. 855.6(b)(1) states (with respect to use of Air Force airfields): Aircraft exempt from the requirement for a civil aircraft landing permit ... (include) ... any civil aircraft under lease or contractual agreement for exclusive US Government use on a long-term basis and operated on official business by or for a US Government agency ..." . This regulation also states: "The Government must hold

liability responsibility for all damages or injury associated with tne operation of the aircraft".

32 C.F.R. 809a.1(a) states: "Air Force installation commanders are responsible for protecting personnel and property under their jurisdictions and for maintaining order on installations, to insure the uninterrupted and successful accomplishment of the Air Force mission".

Air Force Regulation (AFR) 205-57 (28 April 1987) states: "This regulation requires Air Force members to report immediately any suspicion, incident, or situation that has to do with ... sabotage ... aimed at, or affecting, the Air Force or the national security". AFR 205-57, par. 3, states "The Air Force Office of Special Investigations (AFOSI) is charged ... to identify and counter sabotage". AFR 205-57 Section C, par.

18 states: "Each Air Force member or employee who has information (on sabotage) must give it directly to the unit commander or nearest AFOSI office". AFR 205-57 par.18(c) states: "AFOSI will investigate the matter to determine all information needed to protect the Air Force. If the report concerns a matter not within the investigative jurisdiction of the Air Force, AFOSI will refer it to the proper agency".

## STATEMENT OF THE CASE

The basis for federal jurisdiction in the U.S. Court of Appeals was 28 U.S.C. 1298 (a)(10). The case was a contract dispute heard by the Armed Services Board of Contract Appeals under 41 U.S.C. 607(g)(1).

TPI International Airways, Inc., contracted with the Air Force to provide four engine L-188 cargo aircraft for the exclusive use of the Air Force during 1989-1990. TPI had difficulty in meeting the flight schedule due to maintenance requirements. TPI determined that the problems were due to sabotage occurring while the airplanes were on Tinker Air Force Base.

TPI obtained the advice of a former Air Force Office of Special Investigations officer who had many years of experience with sabotage. Colonel Petruskie testified before the ASBCA

that the events that TPI had experienced were clearly the results of sabotage. The Air Force claimed that TPI's problems were simply evidence of sloppy maintenance. The Air Force did not counter the testimony of Colonel Petruskie with any sabotage expert testimony. TPI was not able to obtain any response from the Air Force to investigate the suspected sabotage during the period of the contract. The Air Force terminated the TPI contract because of TPI's inability to meet schedule requirements.

TPI entered bankruptcy and pursued its dispute with the Air Force contending that its aircraft had been sabotaged and that the Air Force had failed to follow its own regulation to investigate the suspected sabotage that had been reported to Air Force contract officials. The Air Force did not deny that it had

failed to follow its own security regulations and AFR 205-57 in particular. The failure of the USAF to follow its security regulation denied TPI both the protection and the expertise to determine the culprit.

The Armed Services Board of Contract Appeals, with respect to the Air Force's failure to follow its own security regulation (AFR 205-57), stated that "The law is settled that where regulations were promulgated for the benefit of the government, the contractor can not complain that the regulations were not complied with". The ASBCA also said that TPI's claim of sabotage "fails for lack of proof". TPI believes that the regulations and the law requires the Air Force to provide investigation to prove or disprove the sabotage, by experts in sabotage, and to protect and defend TPI from such hazards on military airfields.

## ARGUEMENT FOR ALLOWING THE WRIT

The ASBCA has established, and the U.S. Court of Appeals has allowed, a precedent for cases before Boards of Contract Appeals that raises an important question with respect to national security. This important question of federal law has not been, but should be, settled by the Supreme Court. The precedent that now stands is that a contractor serving the armed services can not complain if the government does not follow its own security regulations when that contractor reports suspicions of sabotage that affect the contractor and, consequently, the military operations being served.

The net effect of the ASBCA/Court of Appeals position is that there are two standards applied to the protection of military assets. The term "military assets" includes military personnel,

materials and secrets. Air Force members need not follow security regulations to protect a service contractor who can not complain that the regulations were not complied with. The decision unwisely assigns lower-class status to those personnel, materials, and secrets which rely on contractor operations.

Failure to give equal security, to government owned operations and contractor operations alike, is militarily inexcusable. The result of a rule that denies the necessity for equal security status to both contract and military owned operations could substantially impair military responsiveness and national readiness. It certainly offers a less secure type of service to military personnel who must depend on contract operators for air cargo and troop transport movements.

G.L. Christian and Associates v.

United States, 320 F2d 345, Ct.Cl., (1963) establishes the premise that the authorized regulations of a government agency can impose mandatory contractual provisions on federal officials. This case also tells us that where the regulations of an agency are reasonably adapted to the administration of congressional intent, they have the force and effect of law. Agency regulations are entitled to great deference. On its way to a decision an agency must follow its own regulations; "it is a well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action" Way of Life Television Network, Inc. v. Federal Communications Commission, 593 F2d 1356, 1359 (D.C.Cir., 1979) (Quoting Union of Concerned Scientists v. Atomic Energy Commission, 499 F2d 1069, 1082 (D.C.Cir. 1974)).

The application of security regulations for military contractors, equal to that which the USAF gives to government owned operations. seems to Petitioner TPI International Airways, Inc., to be mandated by existing laws and regulations at least as far as an airline operation is concerned. 10 U.S.C. 8061 provides that the President may prescribe regulations for the government of the Air Force. 10 U.S.C. 8062(d)(3) states that the Air Force consists of all Air Force units with supporting and logistical elements which would appear to include contractor operations. 32 C.F.R. 855.6(b)(1) exempts civil aircraft contracted to the Air Force from a landing permit. That regulation specifically notes that the government has liability responsibility for all damages or injury associated with the operations of such aircraft. 32 C.F.R. 809a.1 makes

Air Force installation commanders responsible for protecting personnel and property under their jurisdictions and for maintaining order on installations to insure the uninterrupted and successful accomplishment of the Air Force mission. Air Force Regulation 205-57, Security, requires the immediate reporting of any suspicion, incident or situation involving sabotage aimed at or affecting the Air Force.

Air Force Regulation 205-57 does not distinguish between contractor and government resources in its requirements. ANY security (sabotage) incident AFFECTING the Air Force is REQUIRED to be REPORTED and INVESTIGATED. TPI does not see how any other application of the regulation would further the Congressional intent of national defense.

The present law is defined by the Armed Services Board of Contract Appeals

as follows:

"The law is settled that where regulations were promulgated for the benefit of the Government, the contractor can not complain that the regulations were not complied with".

A proper rule of law would recognize that: (1) Sabotage, or suspicion of sabotage, occurring on a military installation is always an unacceptable threat to the security of the United States. (2) It is a breach of duty when the military neglects, refuses, or fails to follow, its own regulations that would protect a contractor or invitee on an exclusively controlled military facility where security and investigative services are available only from and/or with the approval of the military.

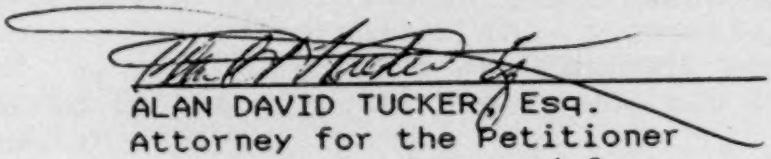
## CONCLUSION

For the reasons herein, it is respectfully requested that a Writ of Certiorari issue to review the matter set forth to establish a rule of law that will require protection of civil aircraft at the same level as Air Force regulations provide for government owned aircraft performing equivalent service. Alternatively stated: That the Air Force must provide contract aircraft, on USAF airfields, the protection defined for USAF aircraft by the Air Force's own security regulation(s) and that the airline may expect such protection as a part of the contractual obligation of the military service to the contractor. The military personnel of this nation deserve no less than such a rule of law in an era when contract operations are a substantial means for the process of national defense.

SIGNATURE OF COUNSEL

Dated: 25 JUNE 1998

RESPECTFULLY SUBMITTED,



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# APPENDIX

CONTENTS OF APPENDIX:

ORDER OF THE COURT OF APPEALS
DENYING REHEARING ..... A-1

THE JUDGEMENT TO BE REVIEWED ..... A-3

United States Court of Appeals
for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on April 10, 1998.

FOR THE COURT
JAN HORBALY, CLERK

Dated: April 3, 1998

by S/Alex Van Veen
Alex Van Veen
Staff Law Clerk

cc: JEAN FRANCES NIVEN
PETER LEVITT

FILED
U.S.Court of Appeals for
The Federal Circuit
APR - 3 1998
JAN HORBALY
Clerk

TPI INTERNATIONAL V AIR FORCE, 97-1192
(BCA-46462)

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Note: Pursuant to Fed.Cir.R. 47.6, this order is not citable as precedent. It is a public record.
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ARMED SERVICES BOARD OF CONTRACT APPEALS

| | |
|---|---|
| Appeal of -- | ) |
| | ) |
| TPI International Airways, Inc. | ) ASBCA No. 46462 |
| | ) |
| Under Contract No. F11626-90-D-0031 | ) |

APPEARANCES FOR THE APPELLANT:
Alan David Tucker, Esq.
Brunswick, GA.
Jean Niven, Esq.
Tampa. FL.

APPEARANCES FOR THE GOVERNMENT:
COL. Michael J. Hoover, USAF
Chief Trial Attorney
Edwin R. Babbitt, Esq.
Trial Attorney
MAJ James A. Blackwell,III,Esq.
Trial Attorney
Scott Air Force Base
Belleville, ILL

OPINION BY ADMINISTRATIVE JUDGE ELMORE
ON APPELLANT'S MOTION FOR
RECONSIDERATION

TPI International Airways , Inc. (TPI or appellant) has filed a motion for reconsideration of the Board's 7 June 1996 decision denying TPI's appeal from its default termination (TPI International Airways, Inc., ASBCA No. 46462, 96-2 BCA p28,373). The Government has filed a reply in opposition and TPI has filed a response to the Government's reply. Familiarity with the Board's decision is presumed.

TPI contends that the Board's finding 50 should be adjusted to reflect the fact that TPI reported suspicions of sabotage and the Government did not follow the reporting requirements stated in Air Force regulation 205-57. TPI further contends that finding 27 is in error in as much as witnesses and documents prove that engine oil was introduced into TPI's aircrafts' hydraulic systems.

TPI had the burden of proving that the Government's failure to follow its regulations caused the default. This TPI failed to do. We have been unable to find, and TPI has not cited evidence which shows there was a connection between the Government's failure to follow its regulations and the default. The law is settled that where regulations were promulgated for the benefit of the government, the contractor can not complain that the regulations were not complied with. Technical Services Corporation, ASBCA Nos. 36505 et al., 93-1 BCA p.25,310 at 126,095, citing Hartford Accident & Indemnity Co. v. United States, 130 Ct. Cl. 490 (1955); George Bernadot Company, ASBCA No. 42943, 94-3 BCA p.27242 at 135,743.

The basis for TPI's contention that engine oil was introduced into aircrafts' hydraulic systems was the analysis reports issued by Lab One, Inc. The witnesses who testified that engine oil was found in the hydraulic oil systems also were relying on Lab One's reports. At finding 28 we determined that Lab One's analysis reports were un-

reliable. At finding 40 we determined that TPI admitted that its poor performance, in part, was due to "lack of experienced maintenance personnel at Tinker to troubleshoot problems with engines, gearboxes and props."

TPI's contentions regarding findings 50 and 27 are without merit.

TPI contends the Board's de novo review of the facts deprives it of its right to due process. We find this contention specious at best. TPI was given its day in court before a tribunal competent to pass upon the subject matter and accordingly, TPI was given due process. Black's Law Dictionary 449, (5th Ed. 1979). TPI has neither provided support for the contention that de novo review deprives a contractor of due process nor has it cited support for the implied contention that the long string of cases which hold that the Board's review was de novo was wrong.*** TPI's contention is not supported by the law and accordingly is without merit.

TPI's contention that the termination for default was improper because the requirements of the default clause that required the Government to "a. give written notice of the default (FAR 52.249-8(a)(1); b. provide ten or more days to cure the failure (FAR 52.249-8(a)(2)); c. specify the failure to be cured (FAR 52-249-8(a)(2))" were not followed is without merit. After 29 August 1990 TPI could not participate in the DOD Air Transportation Program (finding 44) and was unable to provide aircraft to perform delivery services

(finding 47). FAR 49.402-3, procedure for default, subparagraph (c), does not require a show cause notice if the default is based upon the contractor's failure to perform. Precision Standard, Inc., ASBCA Nos. 41375, 44257, 96-2 BCA p.28,461 at 142,155.

The remaining arguements made by TPI in its motion for reconsideration were fully considered by the Board in reaching its original decision and no new evidence or arguements have been raised which would cause us to conclude that our original decision was in error. After careful review and consideration of TPI's motion, the record, and our original decision, we are pursuaded the decision was not in error. Accordingly, our original decision is affirmed.

Dated: 10 October 1996

S/Allan F. Elmore
ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur
S/Mark N. Stempler
MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur
S/Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Acting Chairman

Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 46462, Appeal of TPI International Airways, Inc., rendered in conformance with the Board's Charter.

Dated: 15 OCT 1996

S/Edward S. Adamkewicz
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

*** The Board finds that TPI's reliance on NLRB v. Tennsco Corp., 339 F2d 396 (6th Cir. 1964), in support of its arguement that its was denied due process is not on point since it deals with discrimination and does not address due process.

Supreme Court, U.S.
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October Term, 1998

TPI INTERNATIONAL AIRWAYS, INC.,

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SECRETARY OF THE AIR FORCE,

Respondent.

# SUPPLEMENTAL APPENDIX

PETITION FOR WRIT OF CERTIORARI

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Note: Pursuant to Fed.Cir.R.47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-1192

FILED
COURT OF APPEALS
FOR THE FEDERAL
CIRCUIT

JAN 13, 1998

JAN HORBALY
CLERK

TPI INTERNATIONAL AIRWAYS, INC.,

Appellant,

v

Sheila E. Widnall,
SECRETARY OF THE AIR FORCE,

Appellee.

JUDGEMENT

ON APPEAL from the Armed Services Board of Contract Appeals

In CASE NO(S). 46462

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir.R.36

Per Curiam (NEWMAN, PLAGER, and SCHALL, Circuit Judges)

ENTERED BY ORDER OF THE COURT

DATE: January 13, 1998

Signed/Jan Horbaly/EG

Jan Horbaly/Clerk

ISSUED AS A MANDATE: APRIL 10, 1998